Supreme Court, U.S.
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No. 04-991

IN THE

Supreme Court of the United States

ROBERT ROSSER, M.D.,
Petitioner,

v.

NANCY DICKENSON, CONSERVATOR FOR SANDRA ROBINSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the "gatekeeping" responsibilities mandated by FED. R. EVID. 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, be relaxed for "medical experts?"

2. Is the individual experience of a proffered expert determinative on the issue of evidentiary reliability?

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

The petitioner in this case is Robert A. Rosser, M.D., a defendant in the case below.

The respondent in this case is Nancy Dickenson, Conservator for Sandra Robinson, the plaintiff in the case below.

Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. was also a defendant in the case below. Pursuant to Rule 12.6, it is the petitioner's belief that Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. has no interest in the outcome of this petition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert A. Rosser, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 388 F.3d 976 (6th Cir. 2004). The opinion of the district court (App. 14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2004. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INVOLVED RULE

FED. R. EVID. 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332, diversity of citizenship. The plaintiff, Sandra Robinson ("Ms. Robinson"), was a citizen of the Commonwealth of Virginia. The defendants, Robert A. Rosser, M.D. ("Dr. Rosser"), a pulmonologist, and Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. ("C&T") were citizens of the State of Tennessee. The amount in controversy exceeded the sum of $75,000. Ms. Robinson asserted a cause of action for medical malpractice, claiming that Dr. Rosser deviated from the applicable standard of care by prematurely extubating her following heart surgery, and that such deviation caused her to sustain a permanent brain injury.

The only favorable expert (timely) identified by the plaintiff on the issues of standard of care, breach, and causation was W. Dudley Johnson, M.D. ("Dr. Johnson"), a cardiothoracic surgeon. Following the discovery deposition of Dr. Johnson, Dr. Rosser and C&T moved for the entry of summary judgment in their favor. The district court, applying FED. R. EVID. 702, and the principles announced by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny ("*Daubert, et al.*"), excluded Dr.

Johnson as an expert witness, and granted summary judgment in favor of Dr. Rosser and C&T.

Nancy Dickenson ("Ms. Dickenson") was appointed conservator for Ms. Robinson while the present case was pending in the United States Court of Appeals for the Sixth Circuit ("6th Circuit"). Following this appointment, the 6th Circuit reversed the district court in granting summary judgment for Dr. Rosser, based on its judgment that medical expert testimony is inherently reliable. The 6th Circuit went so far as to state that the exclusion of opinion testimony "**is rarely justified in cases involving medical experts** as opposed to supposed experts in the area of product liability. [Citation omitted.]." (Emphasis added.) (App. 10a.)

REASONS FOR GRANTING THE WRIT

The 6th Circuit's opinion that gatekeeping responsibilities are relaxed for medical experts is without factual or legal basis, and is in direct conflict with decisions reached in other federal circuits. *See Domingo v. T.K.*, 289 F.3d 600 (9th Cir. 2002); *McDowell v. Brown*, 2004 U.S. App. LEXIS 25183 (11th Cir. 2004). Failure to resolve the conflict now only invites a host of inconsistent results in any number of factually similar cases.

There is widespread debate in the United States about an impending, even existing, "medical malpractice crisis," due in large part to the negative social and economic effects of medical malpractice litigation. Any disparate treatment of witnesses providing expert opinion testimony in medical malpractice cases, as such relates to the underlying scientific reliability of their opinions, is without factual or legal justification. Relaxing the mandates of FED. R. EVID. 702 and *Daubert, et al.*, will only foster needless medical malpractice litigation based upon unreliable scientific foundations. Medicine is undisputedly a science. Thousands of generally accepted medical treatises, textbooks, journals, peer reviewed

articles and controlled studies exist on seemingly endless subjects. Far more relevant medical resources exist to test the reliability of expert medical opinions than arguably any other scientific field.

The opinions of a proffered expert are not validated by the announced experience of the witness. FED R. EVID. 702 sets out multiple elements, all of which must be satisfied before a witness is permitted to render an expert opinion. Experience is but one part of one element. Considering only the experience of a witness, to the exclusion of the other applicable factors, ignores the scientific reliability goals of the governing cases and rules, and invites the proliferation of *ipse dixit* testimony. The importance of this evidentiary issue is not limited to the present case, or even to medical malpractice cases in general. The appropriate determination of reliability affects virtually all expert testimony.

ARGUMENT

I. THERE IS NO FACTUAL OR LEGAL BASIS TO RELAX WELL-ESTABLISHED GATEKEEPING RESPONSIBILITIES FOR "MEDICAL EXPERTS" AND THUS FRUSTRATE THE ULTIMATE GOAL OF EVIDENTIARY RELIABILITY.

In reversing the judgment of the trial court granting summary judgment for Dr. Rosser, the 6th Circuit incorporates the following pronouncement in its opinion: "[The exclusion of testimony such as Dr. Johnson's] . . . is rarely justified in cases involving medical experts as opposed to supposed experts in the area of product liability. [Citation omitted.]" (App. 10a.) There is no basis for such distinction.

FED. R. EVID. 702 and *Daubert, et al.,* do not exclude the science of medicine from their scope; in fact, to do so would be analytically unsound. Notwithstanding any applicable geographical considerations, the "standard of care," and/or

any deviation therefrom, naturally incorporates the scientifically accepted means and methods of practicing medicine. What a "prudent practitioner" should do (or should have done) under the same or similar circumstances is necessarily based on a standard of objective reasonableness founded upon independent scientific inquiries, tests and conclusions. Likewise, expert opinions as to "causation," i.e., did any deviation proximately cause the injury complained of, are equally subject to "reliability testing" by the courts. Without doubt, medicine is one of the most critically and thoroughly investigated sciences. In all but the most abstract medical malpractice cases, an extensive library of generally accepted scientific knowledge exists against which the opinions of a proffered expert can be gauged.

Numerous and well-respected periodicals and newspapers frequently decry an impending, or existing, medical malpractice crisis in the United States. "Frivolous lawsuits" form the core bases for medical malpractice tort reform efforts in all levels and branches of government, state and federal. Regardless of the validity of the claims, the perception of the "evil" itself evinces a need for uniform application of evidentiary standards as such pertain to the reliability of medical expert opinions. More importantly, equity and justice demand that the professional conduct of health care providers be judged by generally accepted and, to the extent possible, objective standards. The latter concept has equal application to medical experts rendering opinions for the plaintiff, or for the defendant.

The current inconsistency of positions among the federal appeals courts is apparent. Any delay by this Court in definitively addressing the issue, i.e. does FED R. EVID. 702 and *Daubert, et al.* apply with equal force to "medical experts," simply invites further confusion and inconsistency in all cases in which a cause of action for medical malpractice is asserted.

II. IN EVALUATING THE RELIABILITY OF MEDICAL EXPERT TESTIMONY, THE REVIEWING COURT MUST CONSIDER ALL APPLICABLE STANDARDS.

The 6th Circuit substituted its judgment for that of the district court, holding that a cardiothoracic surgeon (Dr. Johnson) **was not** qualified to render an opinion adverse to a fellow cardiothoracic surgeon (C&T's employee, Richard Michalik, M.D. ("Dr. Michalik")), but **was** qualified to criticize the medical care and treatment provided by Dr. Rosser, a pulmonologist. In reaching its conclusion as to the expert testimony adverse to Dr. Rosser, the 6th Circuit focused almost entirely on the experience of Dr. Johnson, to the exclusion of the principles and methodology upon which his opinions were based. (At the same time, the 6th Circuit held that, despite his relevant experience, Dr. Johnson's opinions adverse to Dr. Michalik were unreliable. The 6th Circuit also failed to address Dr. Johnson's opinions, or lack thereof, on the mandatory element of proximate causation.)

The text of FED. R. EVID. 702 requires that a witness be "qualified as an expert by knowledge, skill, experience, training or education. . . ." However, the evaluation of the opinions of a proffered expert does not end there. The testimony of the witness must "(1) . . . [be] based upon sufficient facts or data, (2) . . . [be] the product of reliable principles and methods," and the witness must have applied the principles and methods reliably to the facts of the case. FED. R. EVID. 702. Any evaluation of evidentiary reliability requires that a court look beyond the factors which may make a witness qualified to render an expert opinion. The court must also determine whether the opinions to be expressed are properly grounded, well-reasoned, and not speculative in nature.

The exclusive reliance on "experience" as the determinative factor with regard to Dr. Johnson's opinions adverse to

Dr. Rosser is manifested by the following statement by the 6th Circuit: "'[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of *experience*.' FED. R. EVID. 702 advisory committee's note (2000 Amendments) (emphasis added)." (App. 7a-8a.) Undoubtedly, an expert **can** be qualified on the basis of experience; however, experience does not equate to or guarantee reliability. As stated elsewhere in the advisory committee notes to FED. R. EVID 702: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" FED. R. EVID. 702 advisory committee's notes.

It is undisputed that Dr. Johnson has extensive experience as a cardiothoracic surgeon; however, Dr. Rosser is a pulmonologist. This case presents a classic example of why courts must look beyond the experience of a proffered expert to evaluate the reliability of the bases underlying the opinions expressed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-5355

NANCY DICKENSON, Conservator for Sandra Robinson,
Plaintiff-Appellant,

v.

CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P.C. and ROBERT ROSSER, M.D.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.
No. 00-00405—Dennis H. Inman, Magistrate Judge.

Argued: September 22, 2004
Decided and Filed: October 25, 2004

Before: KEITH, MOORE, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Timothy W. McAfee, McAFEE LAW FIRM, Norton, Virginia, for Appellant. Steven C. Rose, WEST & ROSE, Kingsport, Tennessee, Tariq A. Zaidi, PENNSTUART, Bristol, Tennessee, for Appellees.

ON BRIEF: Timothy W. McAfee, McAFEE LAW FIRM, Norton, Virginia, for Appellant. M. Lacy West, Julia C. West, WEST & ROSE, Kingsport, Tennessee, Tariq A. Zaidi, Richard E. Ladd, Jr., PENNSTUART, Bristol, Tennessee, for Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge. Nancy Dickenson, as the conservator for Sandra Robinson, appeals the grant of summary judgment in favor of Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. (C&T) and Dr. Robert Rosser in this diversity action for medical malpractice. The issue on appeal is whether the district court properly excluded the proffered testimony of Dickenson's medical experts. For the reasons set forth below, we AFFIRM the judgment of the district court with respect to C&T, REVERSE and REMAND for further proceedings with respect to Dr. Rosser, and VACATE the order excluding the testimony of Dr. John Penek.

I. BACKGROUND

Robinson underwent heart bypass surgery on November 10, 1998. The surgery was performed by Dr. Richard Michalik, a cardiac surgeon employed by C&T. Dr. Rosser, a pulmonologist, was called upon by Dr. Michalik to provide Robinson with postoperative respiratory care. Following the removal of Robinson's ventilation tube, she suffered brain damage due to insufficient oxygen. The lawsuit brought on Robinson's behalf alleged that her injuries were caused by the purportedly premature removal of her ventilation tube following surgery.

By consent of the parties, the case was assigned to a magistrate judge for disposition. Summary judgment in favor of both defendants was granted on the ground that no witness for Robinson could competently testify concerning the standard of care applicable to either C&T or Dr. Rosser. The plaintiff argues on appeal that the district court erred by not allowing cardiac surgeon W. Dudley Johnson, a practitioner from Wisconsin, and pulmonologist John Penek, a practitioner from New Jersey, to provide such testimony. This timely appeal followed.

II. ANALYSIS

A. Standard of review

The district court's grant of summary judgment is reviewed de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Summary judgment was granted in favor of the defendants on the sole ground that the plaintiff failed to present admissible evidence concerning the standard of care applicable to either C&T or Dr. Rosser. *See Rodgers v. Monumental Life Ins. Co.*, 289 F.3d 442, 448 (6th Cir. 2002) ("A complete failure of proof concerning an essential element necessarily renders all other factors immaterial."). Whether the district court's grant of summary judgment was proper consequently turns on the appropriateness of its decision to exclude the testimony of the plaintiff's experts.

B. The district court abused its discretion by excluding the testimony of Dr. Johnson regarding the alleged negligence of Dr. Rosser

Dr. Johnson stated in his affidavit that he is "involved with extubation decisions on almost a daily basis." His curriculum vitae indicates that he has practiced as a cardio-thoracic surgeon since 1965, and that he has performed thousands of heart-related operations. He explained his familiarity with

the standard of care for postoperative cardiac patients in Kingsport, Tennessee as follows:

> (1) The published literature that explains the medical community; (2) Published information that describes the community in general; (3) My own knowledge and experience with the type of cardiac surgery being performed and the management of the patient post operatively; (4) Statements of Dr. Rosser and Dr. Michalik contained in their depositions wherein they describe the standard of care; (5) Statements of Dr. Rosser and Dr. Michalik contained in their depositions wherein they describe their educational background and training; and (6) Reviewing the medical records of Sandra Robinson.

Dr. Johnson elaborated on his experience with extubating postoperative patients in his deposition:

Q. Over the past three years, how many patients have you managed that are on a ventilator that require in, in excess of a three day stay on the ventilator?

A. The majority of my patients.

Q. Okay, how many would that be?

A. Maybe two hundred.

* * *

Q. . . . [D]o you often request a pulmonary consult for your patients?

A. Very commonly, yes.

Q. Okay. And at what point would you request a pulmonary consult?

A. Sometimes even pre-operatively if they have a long history of lung problems. I'll ask them to see them and follow with us together as we take care of the patients. And commonly afterwards. It could be anywhere. Right away or a day or two later if the patients are still in respiratory difficulty.

Q. Okay. Who would make the decision to extubate a patient?

A. Either can, and we haven't always agreed. And I've cancelled extubations on a number of occasions. And then there has been a rare case where the patient needs to be extubated and I do it. I don't, I mean, it's my patient and I can do whatever I want, but, but I would discuss it with the pulmonary person and we will discuss whether we think the patient is ready to be extubated or not.

* * *

Q. Okay. Just take me through your process of determining . . . whether a patient can be extubated?

A. On my patients it's rather uncommon to extubate them at the day of surgery. Most of them, as I mentioned, are long, difficult cases. I commonly spend ten to fourteen hours in surgery on my patients. There's so much to do with them. Post-operatively, the next day if blood gases are normal, the assist on the respirator is way down, he's moving air in and out well, his lung capacity is, very adequate on how much he can take a deep breath and breathe, he obviously, he or she is alert and neurologically intact. The cardiovascular system would be stable. Normal heart function. Normal blood pressure. Chest x-ray would certainly be satisfactory in terms of no diffuse infiltrates and better than, certainly not worse than what it had been before.

Despite Dr. Johnson's extensive experience, the district court did not allow him to testify regarding the medical services rendered by Dr. Rosser on the ground that Dr. Johnson's testimony was unreliable under the gatekeeping principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. The district court elaborated on its reasons in the following two paragraphs of its opinion:

> Dr. Johnson's deposition testimony reveals that he is not competent to testify concerning the standard of care applicable to a pulmonologist at least as concerns extu-

bation of a ventilation tube. Dr. Johnson, obviously, is a cardiac thoracic surgeon, not a pulmonologist; and he is not trained in pulmonology. He has never qualified as an expert witness in a suit against a pulmonologist. Dr. Johnson's deposition revealed that he knows very little about ventilating medical equipment or the settings to be used. He has never written an article on pulmonology, and could not identify any articles about pulmonology which he has read. Looking to *Daubert*-type issues, there was no peer review regarding his opinion regarding Dr. Rosser's negligence. He could not identify what journals were authoritative that would be applicable to the facts surrounding plaintiff's condition. More importantly, he could not say what journals he read or considered in arriving at his opinion and his methodology. Also, at various points in his testimony he contradicted his affidavit. For example, he stated in his expert report that he examined the plaintiff's chest x-ray in arriving at his opinion. But during the deposition, he testified that he in fact never looked at the plaintiff's x-ray.

In sum, under *Daubert* and its progeny, expert testimony must meet a threshold requirement of reliability. There simply must be more than Dr. Johnson's bare assertion to show that Dr. Rosser deviated from the standard of care in Kingsport, Tennessee. The Court is not saying that a cardiac surgeon can never be a reliable expert when testifying in matters involving pulmonology, or even anesthesiology or some other medical specialty. However, the purported expert must demonstrate a familiarity with accepted medical literature or published standards in these other areas of specialization in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702. For these reasons, the Motion for Summary Judgment of defendant Rosser shall likewise be GRANTED.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A district court's exclusion of expert testimony will not be set aside unless we determine that the court abused its discretion. *Gen'l Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997) ("[T]he question of admissibility of expert testimony is . . . reviewable under the abuse-of-discretion standard."). An abuse of discretion is found where the reviewing court is "firmly convinced that a mistake has been made." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (quotation marks omitted) (defining the term "abuse of discretion" to mean that "the lower court relie[d] on clearly erroneous findings of fact, . . . improperly applie[d] the law[,] or use[d] an erroneous legal standard").

The district court appears to have relied most heavily upon its supposition that a "purported expert must demonstrate a familiarity with accepted medical literature or published standards in these other areas of specialization in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702." This is an erroneous statement of the law. No authority was cited by the district court in support of its above-quoted statement regarding Rule 702, nor have we found any. In fact, "the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of

experience." Fed. R. Evid. 702 advisory committee's note (2000 Amendments) (emphasis added); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may go to the weight, not the admissibility of the expert's testimony.") (quotation marks omitted); *Bonner v. ISI Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001) ("There is no requirement that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.") (quotation marks omitted).

The district court also noted that "Dr. Johnson's deposition revealed that he knows very little about ventilating medical equipment or the setting to be used." Presumably, the district court had in mind the following portion of Dr. Johnson's deposition testimony:

Q. Okay. What type of ventilator do you use at your hospital?

A. I don't know that. I don't generally run ventilators and adjust them.

Q. Okay, and what mode of ventilation do you use on your patients on average?

A. In terms of . . .?

Q. In terms of what mode and how that ventilator is getting oxygen to the patient?

A. I don't know the different ventilators that I use.

Q. Okay, well, I mean, are there no general modes of ventilation depending on whether you buy Brand A, Brand B, or Brand C?

A. On the different ventilators, I can't tell you the difference in terms of ventilators.

Q. Well, just tell me in general. What different modes are there to get oxygen to a patient?

A. You just put it in under high pressure. You know, you have volume controls on the ventilators. You have gas control. Percentage of oxygen that you use to ventilate the patients.

Q. What different modes of ventilation are there to get oxygen to a patient?

A. You can intubate them, you can hook it up when they're ventilating that way on the ventilator. You can put a mask over their face. Some kind of, some degree of positive pressure on the mask.

The district court did not explain in its opinion how knowledge of the brand of ventilator used or its settings would affect the reliability of Dr. Johnson's testimony regarding the prematurity of the extubation, which is the issue in this case. Dr. Johnson's testimony regarding the timing of extubation, based on his extensive experience in making those decisions both with and without consultation from a pulmonologist, is not made unreliable by virtue of his inability to recall the mechanical details of the ventilator used in the operation. The timing of extubation is a separate issue from the mechanics of extubation.

As a further reason for its decision, the district court noted that "at various points in his testimony [Dr. Johnson] contradicted his affidavit." The only example offered, however, is that Dr. Johnson "stated in his expert report that he examined the plaintiff's chest x-ray in arriving at his opinion. But during the deposition, he testified that he in fact never looked at the plaintiff's x-ray." This apparent discrepancy is explained by the fact that although Dr. Johnson did not examine the x-ray film itself, he reviewed the radiologist's report, as indicated by the following deposition testimony:

A. I didn't look at [the x-rays] because, as I've already said, there's staggering reasons not to extubate her, so I didn't need to go look for other reasons . . . .

Q. Okay, so you, you didn't look at the films and consider these films?

A. They were never sent to me.

* * *

Q. But you obviously considered the chest x-rays, did you not?

A. Yeah, the reports.

Q. Okay. Well, what did you learn from the reports?

A. Well, my impression on the reports, it was not a dramatic change. There was something there, but certainly not catastrophic changes on the x-ray.

That Dr. Johnson reviewed the x-ray report rather than the x-ray film itself may go to the weight of his testimony before a jury, but it did not render Dr. Johnson's testimony so unreliable that his testimony should have been excluded altogether.

In sum, *Daubert's* role of "ensur[ing] that the courtroom door remains closed to junk science," *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002), is not served by excluding testimony such as Dr. Johnson's that is supported by extensive relevant experience. Such exclusion is rarely justified in cases involving medical experts as opposed to supposed experts in the area of product liability. *See generally* Daniel W. Shuman, *Expertise in Law, Medicine, and Health Care*, 26 J. Health Pol. Pol'y & L. 267 (2001) (characterizing the effect of the *Daubert* and *Kumho Tire* cases on claims of medical expertise as "[m]uch ado about little," while noting that these cases have had a significant effect on toxic tort and products liability litigation). We therefore conclude that the district court abused its discretion by excluding Dr. Johnson's testimony regarding the medical services rendered by Dr. Rosser.

C. The district court did not abuse its discretion by excluding the testimony of Dr. Johnson regarding the alleged negligence of C&T

As the district court noted, "Dr. Johnson professed that he relied upon the deposition testimony of Drs. Michalik and Rosser to underpin his knowledge of the standard of care applicable to cardiac surgeons [such as Dr. Michalik] in Kingsport, Tennessee." Nothing in those depositions, however, supports Dr. Johnson's opinion that the cardiac surgeon is responsible for the pulmonologist's decision of when to extubate a patient. At most, the deposition of Dr. Michalik indicates that the cardiac surgeon often makes the decision to extubate and that frequently such decisions are made collaboratively with a pulmonologist. In this case, however, the uncontroverted evidence establishes that Dr. Michalik called upon Dr. Rosser to "assume that responsibility" and "it was Dr. Rosser who ordered the extubation of the tube."

The lack of support for Dr. Johnson's opinion, coupled with the affidavits of five Kingsport, Tennessee physicians who explained that the practice in Kingsport is that "once a pulmonology consult is obtained, the pulmonologist assumes management of the patient's ventilation and extubation," convinced the district court that Dr. Johnson's opinion on this issue was unreliable. In light of the lack of support for Dr. Johnson's opinion and the contrary evidence found in the affidavits of the local physicians, we conclude that the district court did not abuse its discretion by excluding this testimony. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) ("[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.").

D. The basis for excluding the testimony of Dr. Penek under Rule 37(c) of the Federal Rules of Civil Procedure is no longer pertinent

In a March 5, 2003 order, the trial court excluded the expert testimony of Dr. Penek under Rule 37(c)(1) of the Federal Rules of Civil Procedure. "The Federal Rules of Civil Procedure . . . apply to civil actions in the federal courts, regardless of whether jurisdiction is based on federal question or diversity of citizenship." *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 566 (6th Cir. 2001). Rule 37(c)(1) states as follows:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

We review the exclusion of expert testimony pursuant to Rule 37(c)(1) under an abuse-of-discretion standard. *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000). "[W]here exclusion necessarily entails dismissal of the case, the sanction must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004) (quotation marks omitted). "The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Id.* at 758.

The district court refused to permit Dr. Penek to testify, explaining as follows:

> Serious prejudice would result if Dr. Penek were allowed to testify now. . . . The Court neither faults nor criticizes the efforts of plaintiffs counsel. But there is no good cause for yet another extension of time against these physicians. In the 1525 days between the plain-

> tiff's injury and the filing of the present Motion [to waive the Tennessee locality rule (T.C.A. § 29-26-115(b)) and permit the testimony of Dr. Penek], the proof, if it exists, could and should have been marshaled. Even though the trial date, which was only two months away when the Motion was filed, has been moved, were the Court to grant the Plaintiff's request it would be the better part of another year for the defendants to finally go to trial. Because the scheduling order must have some meaning, particularly three years into a lawsuit, the Motion is DENIED.

Because a new trial date will be set once this case is remanded to the district court, the district court's conclusion that harm would flow to Dr. Rosser by further delay in the trial date if Dr. Penek were allowed to testify is no longer a consideration. We therefore conclude that the order excluding Dr. Penek's testimony should be vacated.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court with respect to C&T, REVERSE and REMAND for further proceedings with respect to Dr. Rosser, and VACATE the order excluding the testimony of Dr. Penek.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

[Filed Mar. 5, 2003]

No. 2:00-CV-405

SANDRA ROBINSON

v.

CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P.C. and ROBERT A. ROSSER, M.D.

MEMORANDUM REGARDING MOTIONS FOR SUMMARY JUDGMENT

The defendants Robert Rosser ("Rosser") and Cardiac and Thoracic Surgery of Eastern Tennessee ("C & T") have moved for summary judgment.[1] A hearing was held on February 25, 2003.

Summary judgment is proper only if the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The non-moving party must be indulged with all possible favorable inferences from the facts. *Plott v. Gen. Motors Corp.*, 71 F.3d 1190 (6th Cir. 1995). Thus, if there are contrary inferences which can be drawn from facts otherwise undisputed, then summary judgment is precluded.

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[1] Doc. 197, 223.

Inasmuch as this is a medical malpractice action, whether there exists contested issues of *material* facts must be determined in the context of T.C.A. § 29-26-115, Rule 703 of the Federal Rules of Evidence, *Daubert v. Merrell Dow Pharmaceuticals*,[2] and *Kumho Tire Co. v. Carmichael*.[3]

T.C.A. § 29-26-115 requires that a plaintiff in a medical malpractice action prove (1) the standard of professional care attributable to the defendants' medical specialties in the geographical are in which the defendants practice, (2) that the defendants breached such standard(s) of care, and (3) that the plaintiff suffered injuries as a proximate result of that breach. Further, the expert witness must be licensed in Tennessee or one of its eight contiguous states to practice the defendant's specialty.[4] Under *Daubert*, the trial court is to serve as a "gatekeeper" and determine if the proffered testimony of an expert witness is reliable. If it is not, the testimony should not be admitted. And in the case of a medical malpractice action, if the expert testimony is deemed unreliable and therefore not admitted, the suit itself must fail due to the lack of an expert witness as required by T.C.A. § 29-26-115.

C & T specializes in the practice of cardiac surgery. The only expert medical witness offered by plaintiff to prove the standard of care applicable to this defendant and the breach thereof is the testimony of Dr. Dudley Johnson, a cardiac/ thoracic surgeon, who practices in Milwaukee, Wisconsin.

Plaintiff does not claim that her injuries resulted from the cardiac surgery performed on her by Dr. Michalik of C & T. Rather, she claims that her injuries were the direct result of a premature post-surgery extubation of a ventilation tube.

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[2] 509 U.S. 579 (1993).

[3] 526 U.S. 137 (1999).

[4] This provision can be waived, as it was waived in this case with respect to Dr. Dudley Johnson, plaintiff s expert witness.

After the cardiac surgery, and because plaintiff was manifesting respiratory problems, Dr. Michalik asked that Dr. Rosser, a pulmonologist, participate in plaintiff's post-surgical care with respect to her respiratory condition. It was Dr. Rosser of course who ordered the extubation of the tube. Plaintiff's expert, Dr. Johnson, opines that Dr. Michalik, as the operating surgeon, remained responsible to plain tiff regarding her respiratory problems, notwithstanding that he requested that Dr. Rosser, a pulmonologist, assume that responsibility.

Dr. Rosser was not Dr. Michalik's agent; he was an independent contractor in every sense of that term. Thus, Dr. Michalik cannot be vicariously liable for any negligent acts by Dr. Rosser. If Michalik, i.e., C & T, is liable to plaintiff, it must be for some breach of duty directly owing plaintiff by C & T.

Absent a claim that Dr. Rosser was incompetent and Dr. Michalik knew or should have known that he was incompetent, or absent a claim that Dr. Michalik had actual knowledge that the extubation was contra-indicated, Dr. Michalik reasonably should be allowed to rely on the pulmonologist to perform his job competently. Stated another way, Dr. Michalik should not be charged with the duty of standing over the pulmonologist and second-guessing every decision made by him in the realm of the pulmonologist's responsibility. Otherwise, there would be little reason to request the services of a pulmonologist. It is, after all, the area of the pulmonologist's specialty and is not within the expertise of a cardiac surgeon. Dr. Johnson himself acknowledged that he often requests pulmonary consultations in his cases, and only rarely performs an extubation himself.

Dr. Johnson's opinion simply is not reliable to the extent that he maintains that Dr. Michalik should be responsible for the premature extubation—if indeed it was premature—performed by Dr. Rosser. Dr. Johnson professed that he relied

upon the deposition testimony of Drs. Michalik and Rosser to underpin his knowledge of the standard of care applicable to cardiac surgeons in Kingsport, Tennessee. However, as evidenced by the affidavits of five physicians who actually practice in the Kingsport area, it is clear that, at least in Kingsport, Tennessee, once a pulmonology consult is obtained, the pulmonologist assumes management of the patient's ventilation and extubation.[5] In short, Dr. Johnson's opinion is not considered reliable in the sense contemplated by *Daubert* and *Khumo Tire*. Moreover, Dr. Johnson could not cite to any treatise or other learned work to support his opinion. Dr. Johnson's opinion is *ipse dixit*, and nothing more.

Since Dr. Johnson's evidence may not be received to establish the standard of care applicable to C & T or a breach thereof, the Motion for Summary Judgment filed by C & T shall be GRANTED.

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[5] At first blush, it appears that the Court is weighing conflicting evidence—Johnson's opinion versus those of the five Kingsport physicians—which normally the Court may not do while considering a motion for summary judgment. But where the issue is the reliability of expert opinion under *Daubert* there necessarily is a modicum of "weighing the evidence." In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court flatly held that the admissibility of expert testimony is discretionary with the trial judge and is reviewable under the abuse-of-discretion standard: "On a motion for summary judgment, disputed issues of fact are resolved against the moving party. . . . But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard." *Id.*, at 143. Dr. Johnson's conclusion is founded solely upon his *ipse dixit*. The difference between his conclusions and those of the five local physicians is stark and diametrically opposed. The basis of Dr. Johnson's opinion is, "it is because I say it is," and that simply cannot be determined to be reliable in the face of five local physicians who actually practice medicine in Kingsport, Tennessee, day in and day out.

All that has been said with respect to the lack of reliability of Dr. Johnson's opinions regarding Dr. Michalik applies with equal force to Dr. Rosser. Indeed, his opinion is even less reliable with respect to Dr. Rosser. Dr. Johnson's deposition testimony reveals that he is not competent to testify concerning the standard of care applicable to a pulmonologist at least as concerns extubation of a ventilation tube. Dr. Johnson, obviously, is a cardiac thoracic surgeon, not a pulmonologist; and he is not trained in pulmonology. He has never qualified as an expert witness in a suit against a pulmonologist. Dr. Johnson's deposition revealed that he knows very little about ventilating medical equipment or the settings to be used. He has never written an article on pulmonology, and he could not identify any articles about pulmonology which he has read. Looking to *Daubert*-type issues, there was no peer review regarding his opinion regarding Dr. Rosser's negligence. He could not identify what journals were authoritative that would be applicable to the facts surrounding plaintiff's condition. More importantly, he could not say what journals he read or considered in arriving at his opinion and his methodology. Also, at various points in his testimony he contradicted his affidavit. For example, he stated in his expert report that he examined the plaintiff's chest x-ray in arriving at his opinion. But during the deposition, he testified that he in fact never looked at the plaintiff's x-ray.

In sum, under *Daubert* and its progeny, expert testimony must meet a threshold requirement of reliability. There simply must be more than Dr. Johnson's bare assertion to show that Dr. Rosser deviated from the standard of care in Kingsport, Tennessee. The Court is not saying that a cardiac surgeon can never be a reliable expert when testifying in matters involving pulmonology, or even anesthesiology or some other medical specialty. However, the purported expert must demonstrate a familiarity with accepted medical literature or published standards in these other areas of specializa-

tion in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702. For these reasons, the Motion for Summary Judgment of defendant Rosser shall likewise be GRANTED.

ENTER:

/s/ DENNIS H. INMAN
DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

[Filed Mar. 5, 2003]

No. 2:00-CV-405

SANDRA ROBINSON

v.

CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P.C. and ROBERT A. ROSSER, M.D.

JUDGMENT

For the reasons set forth in the Memorandum filed this day, the defendants' Motions for Summary Judgment [6] are GRANTED, and this action is DISMISSED.

SO ORDERED:

/s/ DENNIS H. INMAN
DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE

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[6] Doc. 197, 223.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Oct. 25, 2004]

No. 03-5355

NANCY DICKENSON, Conservator for Sandra Robinson,
Plaintiff-Appellant,

v.

CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P.C. and ROBERT ROSSER, M.D.,
Defendants-Appellees.

Before: KEITH, MOORE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED and REMANDED IN PART, and VACATED IN PART.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

APPENDIX E

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.